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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Cross Respondents.

On Cross Petition for a Writ of Certiorari to the
Supreme Court of New Jersey

**REPLY BRIEF IN SUPPORT OF CROSS PETITION
FOR CERTIORARI TO THE SUPREME COURT
OF NEW JERSEY**

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No. 83-596

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If The Court Grants The Petition For Certiorari In *Salorio v. Glaser* (Docket No. 83-353), It Should Also Grant The Cross Petition In Order To Review The Entire Case

Cross respondents' brief in opposition to the cross petition for certiorari proceeds on the premise that this case is identical to *Austin v. New Hampshire*, 420 U.S. 656 (1975). This premise is mistaken.* The circumstances attending the New Jersey emergency transportation tax ("ETT") are fundamentally different from those underlying the New Hampshire tax considered in *Austin*. First, the ETT is imposed in accordance with bilateral agreement entered into by the Governors of New York and New Jersey, which cross petitioners contend is an express exception to the *Austin* rule (see 420 U.S. at 667, n. 12). Second, the explicit purpose of the ETT is to relieve the transportation crisis existing in the New York-New Jersey metropolitan area; all revenues collected under the ETT are statutorily dedicated to financing New Jersey's transportation facilities, which provide a direct and substantial benefit to New York commuters. This is in sharp contrast to the situation presented in *Austin* where there was no such bistate agreement or state object, other than the raising of general revenue.

Cross respondents' attempts to obscure these crucial distinctions are unavailing. Thus, their attempt to deny the existence of a bistate agreement blithely ignores writings between the two states recognizing its existence (see Cr. Pet. App. C) and the undisputed public acknowledgment

* It is noteworthy that cross respondents advanced this same argument as justification for a prior appeal to this Court from an earlier decision of the New Jersey Supreme Court. This Court dismissed the appeal. *Salorio v. Glaser*, 449 U.S. 804 (1980).

of same by the Governors of New Jersey and New York. Cross respondents have never questioned the existence or authenticity of these materials. Moreover, it is clear that interstate agreements may take many forms—written, oral, or simply reciprocal legislation with no independent writings at all. See *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 467-70 (1978). Finally, cross respondents' allegation that there was no agreement overlooks the fact that the only court to have ruled on the question (namely the trial court in the initial trial court proceeding) found that the agreement exists (Cr. Pet. at 8-9, 15).*

In an effort to avoid this Court's review of the entire case, cross respondents assert that the New Jersey Supreme Court concluded in its 1980 opinion that as a matter of state law the 1962 agreement was unenforceable, and suggest that this Court should decline to review questions of state law. This is a blatant distortion of the New Jersey Supreme Court's decision. Contrary to cross respondents' statement, it is entirely clear that the Supreme Court of New Jersey in its initial opinion did not rule on the enforceability of the 1962 Accord under state law, but

* If cross respondents are suggesting that a state court finding is to no effect unless approved by the highest court of the state, they are plainly wrong. A factual or state law legal conclusion passed upon by a lower state court and not reviewed by a state supreme court is generally accepted by this Court on review. See *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 185 n. 8 (1978); *Evco v. Jones*, 409 U.S. 91 (1972). Indeed, this Court has held that where a state court fails to make findings of fact because it views certain evidence in the record as immaterial, there is no bar to this Court itself reviewing the evidence. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 703 (1945); *Merchants National Bank v. Richmond*, 256 U.S. 635, 638 (1921).

rather assumed its enforceability and went on to hold that the agreement was invalid under the Compact Clause (Cr. Pet. App. A at 28a and 30a).^{*} Since the Supreme Court of New Jersey did not rule on the enforceability of the 1962 agreement, there is simply no factual predicate for cross respondents' argument that the decision below rested on an adequate and independent state ground. Rather, the court bottomed its conclusion respecting the Accord squarely on its erroneous interpretation of the federal Constitution. Thus, the New Jersey Supreme Court stated in its 1983 opinion that in its initial opinion it had "questioned the validity of the Accord *under the Compact Clause . . .*" (Pet. App. A at 19) (emphasis supplied). Where the decision of a state court does not address a possible state law issue but instead directly raises a federal question, the Court will not refuse to accept jurisdiction on the basis of an adequate and independent state ground. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 634-5 (1875); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).^{**}

^{*} The only state court to address the issue of the enforceability of the Accord apart from the Compact Clause was the trial court, which held that there was a binding agreement between New York and New Jersey. Under cross respondents' theory—that this is exclusively a state law question (citing *Cuyler v. Adams*, 449 U.S. 433 (1981))—this trial court determination would be conclusive, and review of cross respondents' assertions to the contrary would be foreclosed from consideration by this Court. See *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 185 n. 8 (1978).

^{**} In any event, if it were *unclear* (which it is not) whether the Supreme Court of New Jersey based its judgment on an adequate and independent state ground, the Court, contrary to cross respondents' suggestion, should not dismiss the cross petition for lack of jurisdiction, but rather should stay a ruling on the cross petition pending clarification from the state court. *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945).

In arguing that the 1962 Accord does not pass muster under the Privileges and Immunities Clause, cross respondents fail to appreciate that this Court in *Austin* sanctioned reciprocal actions by States which coordinate their tax laws. 420 U.S. at 667, n. 12. That is precisely what New York and New Jersey attempted to do in their 1962 agreement and the correlative amendments of their respective tax laws. If the Privileges and Immunities Clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism" (420 U.S. at 662), surely an agreement between two States to equitably apportion tax revenues from interstate commuters which results in no economic harm to any individual taxpayer* is not only sanctioned by the Privileges and Immunities Clause but indeed advances the essential purpose of the Clause.

In arguing that the 1962 Accord violates the Compact Clause in causing New York to relinquish its sovereign power to tax its own citizens, cross respondents, like the Supreme Court of New Jersey, misconstrue the effect of the Accord on this litigation. The enforceability of the Accord is not an issue in this case since New Jersey does not seek to enforce the agreement against New York—New York still allows credits in accordance with the agreement. Rather, the question in this case is whether the agreement is binding on individual taxpayers so long as it remains in effect. In the face of an existing agreement between two States determining how revenues from interstate commuters shall be apportioned, can individual taxpayers challenge that arrangement under the Privileges and Immunities Clause when they suffer

* See Cr. Pet. at 12 n. 18-19, 21 n.

no economic harm whatever under the arrangement? No case decided by this Court resolves that question.

As noted, the second fundamental difference between this case and *Austin* lies in the fact that, as fully documented in the record below, the revenues from the ETT are dedicated to funding New Jersey's transportation facilities which are overburdened in large part by the commuting class, of which New York commuters constitute a significant part. There was no such justification for the New Hampshire commuter tax. The tax revenues from Maine and Vermont residents were simply placed in New Hampshire's general fund and used for general state purposes. The ETT dedication is reflected in the Act itself which requires that ETT revenues be used exclusively to finance the New Jersey highway, bus, and railroad systems. Moreover, there is no question that the State expends substantial amounts for the benefit of New York commuters. Thus, in the remand proceeding before the State trial court, the State's expert witnesses produced extensive evidence of actual State expenditures allocable to the New York commuting class for highway, bus, and rail facilities. On the basis of such evidence, both the trial court and the Supreme Court of New Jersey concluded that New York commuters are a "peculiar source" of the transportation problem in New Jersey (Pet. App. B at 53a to 54a; Pet. App. A at 12a) and impose substantial burdens on New Jersey's transportation network. While the Supreme Court of New Jersey found that net ETT receipts were not substantially proportionate to transportation costs allocable to New York commuters, it did not question New Jersey's good faith reliance on the severe transportation problem and the use of ETT revenues to relieve that problem as a justification for the imposition of the ETT. The

court simply found, as a factual matter, that the revenues collected under the ETT were constitutionally disproportionate to the State's expenditures for transportation facilities allocable to the New York commuters (Pet. App. A at 15a). In so concluding the court failed to realize that the Accord compels a different result.

In short, there is simply no basis for equating this case with *Austin*, both because of the 1962 Accord between New York and New Jersey and because of the tailoring of the ETT to meet a problem created in significant part by nonresident commuters. Thus, if the Court were to grant the petition for certiorari, it is imperative that it also grant the cross petition in order to review the effect of the Accord and the payment by New Jersey residents of substantial other taxes on the validity of the ETT under the Privileges and Immunities Clause.

CONCLUSION

For the foregoing reasons, the cross petition for a writ of certiorari should be granted.

Respectfully submitted,

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